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Supreme Court, U.S.
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NO: _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

RICHARD M. MADDOX
VICKIE ELLEN CALLAHAN
GARY DEAN GILLUM — PETITIONERS

VS.

STATE OF ALABAMA — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

DAVID CROMWELL JOHNSON
300 21st Street North
Suite 900
Birmingham, AL 35203
205/328-1414

56pp

QUESTION PRESENTED FOR REVIEW

Was the use of binoculars by police to view that which could not be seen by the unaided eye intrusive and unreasonable conduct which violated petitioner's expectations of privacy?

NO: _____

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QUESTION PRESENTED FOR REVIEW

Was the use of binoculars by police to view that which could not be seen by the unaided eye intrusive and unreasonable conduct which violated petitioners' expectations of privacy?

OPINIONS BELOW

The decision of the Supreme Court of Alabama was handed down on April 25, 1986, and the order without opinion denying the applications for rehearing before that court was delivered on June 13, 1986. Neither the opinion nor the order have been published yet; they are included in the appendix.

The decision of the Court of Criminal Appeals of Alabama was rendered on June 11, 1985, and the order without opinion denying the application for rehearing was delivered on July 23, 1985. Neither of these decisions has been published; they are included in the appendix also.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF JURISDICTION

On April 25, 1986, the Alabama Supreme Court affirmed the convictions and sentences of Vickie Callahan and Gary Gillum, and remanded Richard Maddox's cause to the Alabama Court of Criminal Appeals with directions to reconsider a state sentencing issue. Applications for rehearing filed by the State and petitioners were denied on June 13, 1986.

Callahan and Gillum invoke this Court's jurisdiction under Title 28, § 1257(3).

Maddox requests this Court to assume jurisdiction over him under the finality doctrine of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in spite of the fact that his cause was remanded with directions to reconsider his argu-

ments that his sentencing was constitutionally disproportionate. Under Cox Broadcasting, the issue raised before this Court by Maddox has been finally determined and is ripe for review.

> There are now at least four categories of such cases in which the Court has treated the decision on the federal issue a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts ...
>
> In the first category are those cases in which there are further proceedings .. yet to occur in the state courts but where for one reason or another the federal issue is conclusive ... In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.

Cox Broadcasting, 420 U.S. at 476-80.

STATEMENT OF THE CASE

This is a drug offense case. On June 10, 1982, Richard Maddox, Vickie Callahan and Gary Gillum were arrested at their farm home. Maddox and Gillum were indicted for trafficking in cannabis, and Callahan was indicted for possession of cannabis. Ultimately, Maddox was tried in the Circuit Court of Coosa County, Alabama and convicted as charged. Gillum and Callahan originally plead not guilty, but later withdrew that plea and entered guilty pleas with the reservation of their right to contest on appeal the legality of the search which resulted in their arrests.

The evidence presented at Maddox's trial showed that on June 9, 1982, Maddox, Callahan and Gillum were living on a farm in Coosa County, Alabama.

Officer Windsor, an investigator with the Coosa County Sheriff's Department, had information that marijuana was being grown on this farm. Based on this information, he and Coosa County Deputy Sheriff Browning proceeded to the farm. They approached on a dirt road south of the property, walked through the woods around the south end of the property and observed a "normal farmhouse scene," including a residence, shed, garage, and chicken house. The chicken house was located 15 to 20 feet from the residence and had attached to it a greenhouse. (Tr. 29-30, all references "Tr." are to the trial transcript of State of Alabama v. Richard Maddox.) Windsor and Browning were able to observe all this from behind an old barbed wire fence which encircled the property. According

to a registered land surveyor, the fence was about 400 to 425 feet away from the greenhouse. (Tr. 181)

After observing the general area and not seeing anything, Windsor and Browning walked along the edge of the woods in a westerly direction to a position due south of the greenhouse. In order to get a better view, Windsor crossed the fence and concealed himself in some bushes so he could get a better view of the greenhouse. (Tr. 32-33) With the aid of binoculars, Windsor was able to see "a couple of small plants," which he recogniz d as marijuana, growing outside the greenhouse. (Tr. 34) Windsor testified that he was unable to see any plants with the unaided eye. (Tr. 76)

Windsor then proceeded to work his

way to the corrugated fiberglass greenhouse and a pickup truck which was parked within two feet of the greenhouse. (Tr. 97) From this vantage point, he was able to see inside the greenhouse, and saw more plants he recognized as marijuana.

Windsor and Browning then left to obtain a search warrant based on Windsor's observations. The affidavit executed by Windsor said in pertinent part:

> Before me, Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this the 9th day of June, 1982, he has personally seen in plain view and within the last twenty-four hours and has probable cause to believe that there is now being cultivated marijuana plants ... upon the premises of, to wit: Gary Dean Gillum ...

In addition to the affidavit, Judge Teel was presented with Windsor's sworn

oral testimony that he had seen marijuana inside the greenhouse. The search warrant was issued by Judge Teel.

On June 10, 1982, the warrant was executed and the petitioners arrested. Law enforcement officials found a large quantity of marijuana plants growing inside the greenhouse and marijuana inside the residence.

The Alabama Court of Criminal Appeals and Supreme Court found that Windsor has encroached upon the curtilage when he moved to the pickup truck parked in front of the greenhouse. The Court of Criminal Appeals held that his conduct was a violation of petitioner's fourth amendment rights, and any information obtained as a result of his conduct could not be used to supply probable cause for the issuance of the

warrant. However, the Court of Criminal Appeals found that the issuance of the warrant was not based on this information because Officer Windsor did not include it in the four corners of his affidavit. The court further held that even if the illegally obtained information had been included, the warrant would still be valid because there was sufficient untainted evidence of the two plants to support its issuance.

The Supreme Court of Alabama agreed with the Court of Criminal Appeals and upheld the validity of the search warrant on the basis of the information about the two plants outside the greenhouse.

> Even given the illegality of Officer Windsor's intrusion into the curtilage, the warrant is valid if the underlying affidavit contains enough information independently obtained to establish probable cause. ... Officer Windsor testified that he observed, from a position outside

> the curtilage, two marijuana plants growing outside the greenhouse. This information is itself sufficient to establish probable cause.

Ex Parte Maddox, [MS 4/25/86, p. 5-6] ____ So.2d ____ (Ala. 1986).

Petitioners filed an application for rehearing and argued that the evidence about the two plants outside the greenhouse must be excluded on the basis that this information was obtained in violation of petitioners' fourth amendment right and their legitimate expectation of privacy. This is the issue now presented to this Court.

ARGUMENT FOR GRANTING THE WRIT

The basis for this petition is Supreme Court Rule 17.1(b) and (c). This case presents an issue of federal law and constitutional interpretation which has not been decided by this Court yet. Some of the federal courts of appeals have been presented with the issue, and have rendered decisions contrary to and in conflict with the decision of the Alabama Supreme Court. This Court, in the two recent aerial surveillance cases, California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210 (1986) and Dow Chemical Company v. United States, 476 U.S. ___, 90 L.Ed.2d 226 (1986), addressed this issue in dicta with different facts before it.

In this case, the testimony of Officer Windsor is clear that he moved

from beyond the fence to some point closer to, but still outside of the curtilage, in an effort to get a better view of the farm and inside the curtilage. While there, he used his binoculars to look into the curtilage and saw the two plants. He testified at the trial that without the aid of the binoculars, he was unable to discern any plants. (Tr. 76) He moved in closer and used the binoculars as an aid to see the activities of the curtilage and saw the plants in front of the greenhouse.

The evidence of the two marijuana plants should have been suppressed. The Alabama Supreme Court should not have relied on Windsor's observation of these plants to support the affirmance of the validity of the search warrant.

In United States v. Taborda, 635

F.2d 131 (2d Cir. 1980), the Second Circuit held:

> We conclude that observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy. However, any enhanced viewing of the interior of a home does impair a legitimate expectation of privacy and encounters the Fourth Amendment's warrant requirement, unless circumstances create a traditional exception to that requirement.

Taborda, 635 F.2d at 139.

In Taborda, DEA agents occupied an apartment directly across the street from the defendant's apartment. They were about to observe activities inside the defendant's apartment by peering through his uncurtained windows. On the basis of what the agents observed, a search warrant of the apartment was obtained. The affidavit in support of the warrant stated that the surveillance

had been conducted "at times by means of a highpowered telescope" set up in the DEA's apartment. The affidavit did not indicate which observations were enhanced by the use of the telescope and which were obtained through the unaided eye. The Second Circuit held that the only information which may be considered when determining whether probable cause existed for the issuance of the warrant was the information obtained without the use of the telescope, and remanded the case for a hearing to determine which observations were with the unaided eye and whether those observations alone were sufficient to provide the probable cause. The Second Circuit applied the principles of Katz v. United States, 389 U.S. 347 (1967):

> Analysis of telescopic surveillance pursuant to the Katz tests means that the fact that the area observed by the agents is the interior of a

> residence is significant, for "a man's home is, for most purposes, a place where he expects privacy." The very fact that a person is in his own home raises a reasonable inference that he intends to have privacy, and if that inference is borne out by his actions, society is prepared to respect his privacy. But the inference may be rebutted by the person's own actions. If in his home he conducts activities or places objects in such a way that the activities or objects are seen by the unenhanced viewing of persons outside the home, located where they may properly be, such observations transgress no Fourth Amendment protections because "no intention ... has been exhibited" by the householder to prevent the unenhanced viewing of others. Absent exposure to such unenhanced viewing, however, we do not believe the inference of intended privacy at home is rebutted by a failure to obstruct telescopic viewing by closing the curtains. The vice of telescopic viewing into the interior of a home is that it risks observation not only of what the householder should realize might be seen by unenhanced viewing, but also of intimate details of a person's private life, which he legitimately expects will not be observed whether by naked eye or enhanced vision. [footnotes and cites omitted.]

Taborda, 635 F.2d at 138-39.

The Second Circuit held that any

enhanced view of the defendant's apartment was an intrusion on his Fourth Amendment protections, and the information could not be used to provide the probable cause for the warrant.

The Eleventh Circuit, in United States v. Whaley, 779 F.2d 591 (11th Cir. 1985), applied the reasoning and holding of Taborda under circumstances similar to this case. Defendant Whaley set up a laboratory in his basement to manufacture illegal drugs. DEA agents conducted surveillance of the basement from the neighbor's property. They were able to see the basement activities though a window. Although all activities could be seen with the naked eye, the agents frequently used binoculars to aid their observations. The information obtained from the surveillance was

relied upon to show probable cause for the issuance of a search warrant of the basement. Whaley argued that the warrant was invalid because the visual observations had violated his Fourth Amendment rights. The Eleventh Circuit held that the unaided observations did not intrude upon his rights because "given the duration of the activity in [his] basement and the increased chance of discovery caused by the activities of [his co-conspirator] prior to the DEA's surveillance," he had no reasonable expectation of privacy.

Whaley next argued that the enhanced observations tainted the issuance of the warrant.

> The use of vision enhancing devices can taint an otherwise valid surveillance of the interior of a home when the devices allow the observer to view not only activities the homeowner should realize might be seen by unenhanced viewing but also the details of activities the

> homeowner legitimately expects will not be observed. In the surveillance in this case, however, the agents did not need binoculars to view the illicit conduct in appellant's basement. During the evidentiary hearing on appellant's motion to suppress, the magistrate heard testimony from the agents concerning their observations. The agents described which activities they could have observed without binoculars and which activities or objects could be seen only with the binoculars. In his report and recommendation to the district court, the magistrate found that, although the agents regularly used binoculars during the surveillance, the majority of the conduct described in the affidavit could have been viewed without visual aid ... The magistrate concluded, therefore, that ample probable cause existed to issue the search warrant even if the binocular assisted observations described in the affidavit were not considered.

Whaley, 779 F.2d at 591.

The Eleventh Circuit held that the inclusion of the enhanced observations in the affidavit was harmless because the agents could have viewed the activities with the naked eye, and these

observations were few in comparison to the amount of information obtained through the naked eye.

In United States v. Lace, 669 F.2d 46 (2d Cir. 1982), the circuit court noted that use of visual aids to examine places protected from public view is a violation of the Fourth Amendment. Lace, 669 F.2d at 51. However, in that case, it found that although binoculars and a spotting scope were used to observe activities in the curtilage, there was no reasonable expectation of privacy. "[B]ecause the area between the house, the garage, and the barn was clearly visible from the road and could easily be observed by outsiders who "could enter the open property at will", there was no reasonable expectation of privacy. Lace, 669 F.2d at 50. In the

case at bar, the curtilage could not be seen from the road. The property was fenced off and at various points had "No Trespassing" signs posted. (Tr. 184-86) There was also a second fence with a gate located near the house itself. (Tr. 82-83) Petitioners could reasonably have held an expectation of privacy in the activities and small objects within the curtilage. The curtilage is entitled to the same degree of Fourth Amendment protection as the home. It is the "area to which extends the intimate activity associated with the "sanctity of a man's home" and the privacies of life." Oliver v. United States, 104 S. Ct. 1735, 1743 (1984). It is a reasonable expectation that the "area immediately adjacent to the home will remain private." Oliver, 104 S. Ct. at 1743.

The fact that some of petitioners open air activities where seen does not render their expectation of privacy unreasonable. "The constitution does not require that in all cases a person, in order to protect his privacy, must shut himself off from fresh air, sunlight and scenery." State v. Ward, 617 P.2d 568, 573 (Haw. 1980). Petitioners had expressed and manifested an intent and belief that the activity of the curtilage be protected from public view.

In United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), the Ninth Circuit distinguished its case from cases like Taborda on the basis that defendants had no reasonable expectation of privacy in their activities which occurred on their ranch. In that case, a Coast Guard

helicopter, with agents using special camera lenses, observed tire tracks leading to and from a barn and a new extension built on the barn. They also observed a tractor trailer rig and a van on the property. The Ninth Circuit held that defendants did not have a reasonable expectation of privacy because there were frequent Coast Guard helicopter flights over the property prior to this surveillance. "As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's airborne scrutiny of the objects observed here, large schale modifications of the Allen Ranch landscape and barn." Allen, 675 F.2d at 1381.

The fact presented in the case at bar are substantially different from

those presented in Allen. This case is not one where defendants are claiming a reasonable expectation of privacy in massive objects located on their property. They claim only that the activity and small objects located within the curtilage were protected from the public view. They were not visible from any public road. Windsor testified that he could not see them, and it was not until he had crossed the fence and stopped about halfway to the greenhouse that he was even able to see the plants, and then, only with the aid of binoculars.

The Supreme Court of Hawaii has considered a trio of cases regarding surveillance of private property with the use of visual aids, which conflicts with the decision of the Alabama Supreme

Court. The court held that telescopic surveillance which allows police to see what they could not see with the unaided eye is illegal.

> We find that the police officer's use of the binoculars as an optic aid was unreasonable and intruded upon appellants' reasonable expectation of privacy. Noone can doubt that telescopic aids are useful investigative tools in the hands of law enforcement officers. Sophisticated optical aids permit the police to peer into secret places from great distances without a suspect knowing that his movement is being watched. But, if the purpose of the telescopic aid is to view that which could not been seen without it, it is a constitutional invasion. (emphasis added)

State v. Ward, 617 P.2d 568, 573 (1980); State v. Dias, 52 Haw. 100, 470 P.2d 510 (1970)(telescopic surveillance of passageway between two apartments on private property struck down even though activities observed were occurring outside, where defendants were on private land

and had reasonable expectation of privacy). Cf. State v. Hobron, 648 P.2d 194, 197 (1982)(no invasion of privacy where binoculars used to "confirm unaided observations into an area where appellant ha[d] no reasonable expectation of privacy.").

In two recent cases before this Court, the issue was brought up, but the Court declined to rule on it because the facts of each case did not require the ruling. In Dow Chemical Company v. United States, 476 U.S. ____, 90 L.Ed.2d 226 (1986), the Court was asked whether the EPA's aerial photography and surveillance of Dow's industrial complex violated the Fourth Amendment. Evidence was presented that photographs of the facility were taken from an aircraft within the navigable airspace, with the use of a precision aerial mapping camera. The Court held that there was

no Fourth Amendment violation. Almost as an afterthought, the Court stated:

> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, might be constitutionally prescribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.

Dow Chemical, 476 U.S. at ____, 90 L.Ed.2d at 237-38.

In a footnote, the Court explained that it could not rule whether enhanced observation would be an intrusion because "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations." Dow Chemical, 476 U.S. at ____, 90 L.Ed.2d at 238 n. 5.

In California v. Ciraolo, 476 U.S. ___, 90 L.Ed.2d 210 (1986), another aerial surveillance case decided by this Court on the same day as Dow Chemical, the Court clearly held that naked eye observations of the curtilage from navigable airspace do not intrude upon reasonable expectations of privacy, but again declined to decide the question of whether enhanced views of the curtilage would violate the Fourth Amendment. In a footnote, the Court noted that although it was not in issue, "[t]he State acknowledges that 'aerial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens'. " Ciraolo, 476 U.S. at ___, 90 L.Ed.2d at 218 n. 3.

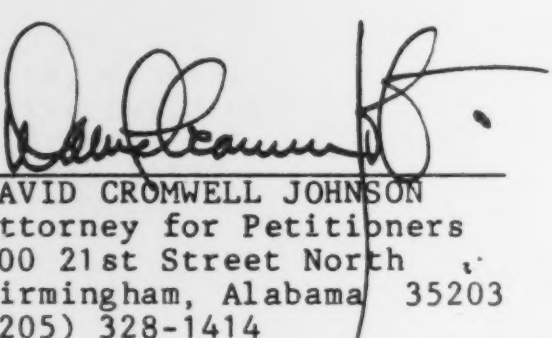
CONCLUSION

The Alabama Supreme Court refused to exclude the information about the two plants which was obtained only as a result of surveillance aided by binoculars. Instead, it considered this to be sufficient information to support the issuance of the search warrant. Without this information, there would be no probable cause to search. This decision is in conflict with the decisions of other jurisdictions which have considered the issue.

If the decision of the Alabama Supreme Court is allowed to stand, then citizens have absolutely no protection from intrusive searches. The combination of the open fields doctrine and this recent decision means that persons living in Alabama and conducting their

business here can have no reasonable expectation of privacy in their outdoor activities, even if those activities occur within the curtilage or backyard of their home. The only activities which would be protected are those which occur inside behind closed windors and doors.

Wherefore, the above premises considered, petitioners respectfully request this Honorable Court to grant the writ of certiorari to the Alabama Supreme Court and take the issue under consideration.



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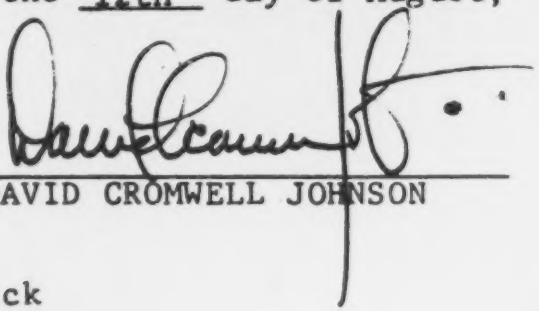
CERTIFICATE OF SERVICE

I do certify that I have mailed a copy of the foregoing on all counsel of record by placing same in the United States mail, first class postage pre-paid, on this the 12th day of August, 1986.



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A P P E N D I X

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

5 Div. 761
5 Div. 919
5 Div. 920

Richard M. Maddox
Vickie Ellen Callahan
Gary Dean Gillum

v.

State

Appeals from Coosa Circuit Court

Decided June 12, 1985
Rehearing denied July 23, 1985

PATTERSON, JUDGE.

The appellants, Richard M. Maddox, Vickie Ellen Callahan, and Gary Dean Gillum, were arrested on June 10, 1982, and charged with violating the Alabama

Uniform Controlled Substances Act. Ala. Code 1975, § 20-2-1 through 20-2-144. Appellants Maddox and Gillum were specifically charged with trafficking in cannabis, in violation of § 20-2-80, and appellant Callahan was specifically charged with possession of marijuana, in violation of § 20-2-70. Indictments were returned against each appellant, by the June 1982 term of the Coosa County Grand Jury, indicting each with the violation for which they were initially charged.

On December 2, 1982, Maddox was found guilty of trafficking in cannabis by a Coosa County jury. Following an unfavorable pre-sentence report, Maddox was sentenced to a term of fifteen years in the penitentiary. On November 28, 1983, eleven months after Maddox was

found guilty, Callahan pleaded guilty to felony possession of marijuana and was sentenced to three years' imprisonment. On the same day, Gillum pleaded guilty to trafficking in cannabis, and was sentenced to four years' imprisonment. In a supplemental plea agreement, the State, with apparent approval of the trial court, agreed that Callahan and Gillum retained the right to appeal the legality of the search which led to the obtaining of evidence against the appellants.

Subsequent to this agreement, Callahan and Gillum moved to consolidate their appeals with that of Maddox. A similar motion was made by the State. All appellants are represented by the same attorney on appeal. The motions to consolidate were granted by this court

on November 7, 1984.

On his appeal, Maddox questions the legality of the search and seizure of evidence which led to his conviction. At trial his motion to suppress, after a hearing thereon, was overruled by the trial court. In a supplemental brief filed on behalf of Callahan and Gillum, they raise the same issues presented for review by Maddox. Resolution of the issues raised by Maddox will be dispositive of the issues raised by Callahan and Gillum.

On June 9, 1982, Officer David Windsor, an investigator with the Coosa County Sheriff's Department, received information that marijuana was being grown on premises subsequently determined to be occupied by Maddox, Callahan, and Gillum. Based upon this

information, Windsor and Coosa County Deputy Sheriff Terry Browning proceeded to the property. Windsor and Browning approached from a dirt road south of the property and observed what Windsor described as a "normal farmhouse scene."

Windsor testified that he observed a dwelling house, shed, garage, and chicken house, all grouped in the same general area. The chicken house was located 15 to 20 feet from the dwelling. Attached to the east side of the chicken house was a greenhouse-type structure "covered with corrugated fiberglass." Windsor and Browning observed this scene from a wooded area south of the buildings and beyond an "old fence," which encircled the property. This fence was described as "old," but not decayed. Windsor

testified that the fence was approximately 200 to 300 feet south of the buildings. J. M. Keel, a land surveyor, testified that the fence was 400 to 425 feet from the greenhouse.

After observing the general area, the deputies then walked along the "edge of the woods" in a westerly direction, to a position due south of the greenhouse. In order to get a better view, Windsor then crossed the fence and concealed himself in some bushes along the edge of a pond which was on the property. From this position, Windsor studied the scene with the aid of a pair of binoculars. Windsor testified that with the aid of the binoculars he observed "a couple of small plants," which he recognized as marijuana, growing outside the greenhouse doors.

Windsor then moved closer to the greenhouse and hid behind a pickup truck parked in front of the greenhouse. Windsor observed two more marijuana plants growing outside the greenhouse. The greenhouse had two large doors with large slits hung at the opening. Windsor could see into the greenhouse and observed more marijuana plants. The deputies then left and obtained a search warrant based on Windsor's observations.

On June 10, 1982, Windsor and five other law enforcement personnel returned to the property to execute the search warrant. The warrant was directed to Gillum as owner of the property. His ownership was indicated by the county tax assessor's records. Maddox, Callahan, and Gillum were found in the greenhouse. Windsor testified that,

upon being arrested, Maddox stated, "I don't guess that was such a good idea after all." During a search of the residence, marijuana was found in almost every room. The appellants accompanied the officers during the search, and Windsor testified that Maddox identified one of the bedrooms as being his. The two other bedrooms were identified as belonging to Callahan and Gillum. Maddox also claimed ownership of some "cash money" which was in the room identified as his. In reference to the money, Maddox purportedly stated to Windsor. "I have just gotten my check cashed. That doesn't have anything to do with this." Maddox did not take the stand in his own behalf either on the motion to suppress or at trial. He offered no evidence at trial and his

defense consisted of a probing and searching cross-examination of the State's witnesses and arguments to the jury.

On appeal the appellants contend that the search warrant was improperly issued and therefore that no evidence resulting from the search would be admissible against them. Appellants do not question the facial sufficiency of the affidavit nor do they dispute the evidence presented to the magistrate to support a finding of probable cause for the issuance of the search warrant. Rather they contend that all the evidence before the magistrate was obtained by the officer in violation of their Fourth Amendment rights, and, therefore, that it was improper for the magistrate to consider it in making a

determination of probable cause. The State's sole argument is that Maddox did not have standing to contest the search; it neither addresses the validity of the search nor the issues as raised by Callahan and Gillum.

I

In contending that the evidence seized pursuant to the search warrant should have been suppressed, it is argued that Windsor's actions in gaining his information for the magistrate's probable cause determination constituted a search; that this warrantless search could not be justified as falling within the "open fields" or "plain view" doctrines; and that, therefore, the evidence obtained should not have been used to secure the warrant. In effect, the appellants contend that the two

doctrines do not operate to allow Officer Windsor's observations to be utilized as probable cause to support the issuance of the search warrant. We agree that the cited doctrines are inapplicable to the facts of this case; however, we view the inapplicability of these doctrines as having no effect on the issuance of the warrant.

Our analysis will first focus on Officer Windsor's initial observations from his position near or at the pond. We will then discuss the ramifications of Officer Windsor's second position closer to the greenhouse. As will be seen, Officer Windsor did not violate any of the appellants' Fourth Amendment rights until he crossed the constitutionally protected threshold of the curtilage in order to obtain a

better view of the plants he had previously identified as marijuana.

A.

When Officer Windsor positioned himself near the pond and spotted the two marijuana plants growing outside the greenhouse, he was not in a factual situation in which the "plain view" doctrine would have been applicable. This doctrine allows government agents to make warrantless seizures under certain well defined circumstances. See Myers v. State, 431 So. 2d 1342 (Ala. Cr. App. 1982), cert. quashed, 431 So. 2d 1346 (Ala. 1983). See also Moylan, The Plain View Doctrine, 26 Mercer L. Rev. 1047 (1975); W. LaFave, Search and Seizure, § 2.2 (1978). We view the facts of the case at bar as a situation more appropriately designated as an

"open view" in which Fourth Amendment protections do not operate. See Texas v. Brown, 460 U.S. 730 (1983); Scales v. State, 13 Md. App. 474, 284 A.2d 45 (1971).

Appellant secondly contends that the "open fields" doctrine does not apply. The "open fields" doctrine allows government agents to make warrantless seizures of property in open field areas. "The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects', is not extended to open fields." Hester v. United States, 265 U.S. 57, 59 (1924). Appellant does not argue that the pond was within the curtilage of the home, and the tendency of the evidence would not support such a finding given, its great distance from

the residence. As stated by Judge Moylan, The Fourth Amendment Inapplicable, 1 S. Ill. U.L.J. 75, 83 (1977), "The clear teaching of Hester is rather that in open fields, the Fourth Amendment is inapplicable and that noncompliance with its dictates is therefore, immaterial." The clear pronouncement of Hester was recently reaffirmed by the United States Supreme Court in Oliver v. United States, ____ U.S. ____, 104 S. Ct. 1735, 1741 (1984), where the Court stated that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Furthermore, it is made clear by the teaching of Oliver, ____ U.S. at ____, 104 S. Ct. at 1744, that the fact that

Officer Windsor was trespassing when he observed the two marijuana plants, has "little or no relevance to the applicability of the Fourth Amendment." See also, Whistenant v. State, 50 Ala. App. 182, 278 So. 2d 183, cert. denied, 291 Ala. 802, 278 So. 2d 198, cert. denied, 414 U.S. 1066 (1973). It is clear that Officer Windsor could legitimately search the open fields surrounding the property without violating any Fourth Amendment rights, because "[t]he Fourth Amendment is simply not 'out there' in the open fields." Moylan, The Fourth Amendment Inapplicable, at 92. See also Skipper v. State, 387 So. 2d 261 (Ala. Cr. App.), cert. denied, 387 So. 2d 268 (Ala. 1980).

B.

The testimony of Officer Windsor established that the residence, garage, shed, chicken house, and greenhouse were all in relatively close proximity to each other. Officer Windsor described it as a "normal farmhouse scene" situated on approximately forty acres of land, enclosed by barbed wire fencing. Mr. C. M. Keel testified that he observed the presence of several "no trespassing" signs around the boundary when he surveyed the property. Officer Windsor denied seeing any signs. When Officer Windsor approached the greenhouse, he had to calculate his position in order not to be seen by persons occupying the residence, which was located 15 to 20 feet from the chicken house which had the greenhouse appended to it. This chicken house was

located south of the residence, and another, smaller building was situated on the north side of the residence. The front door of the residence faced east. The pond was located south of the chicken house/greenhouse, and Windsor positioned himself on the east end of the pond. Officer Windsor was therefore observing the front of the residence and chicken house/greenhouse. A truck, which Officer Windsor hid behind when he approached for a closer observation, was parked in front of the chicken house/greenhouse.

In Whistenant v. State, 50 Ala. App. at 194, 278 So. 2d at 194, the court stated:

> "The Fourth Amendment does, however, apply to buildings within the curtilage which may include 'a garage ...; a barn ...; a

> smokehouse ...; a chicken house ...; and similar property. Whether the place to be searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.' Care v. United States (10 Cir.) 231 F.2d 22."

See also Skipper v. State, supra. The evidence adduced at trial clearly established that the chicken house/greenhouse was within the curtilage of the residence. No Fourth Amendment violation occurred until Officer Windsor made this warrantless entry into a constitutionally protected area. As stated by Judge Moylan:

> "When the policeman stands outside the constitutionally protected area and looks inside, his constitutionally legitimate observations simply give him probable cause. Some additional predicate is necessary for him

then to cross the threshold.

> "In the case of fixed premises, all the probable cause in the word will not justify a warrantless entry. Coolidge [v. New Hampshire, 403 U.S. 443 (1971),] was very clear on that point...."

Moylan, The Plain View Doctrine, 26 Mercer L. Rev., at 1098.

II

Having determined that Officer Windsor encroached upon the curtilage without a warrant in violation of the Fourth Amendment protection against unreasonable searches, we must now determine whether this violation invalidated the warrant and, consequently, whether the evidence seized should have been suppressed.

In the case sub judice, the warrant affidavit states in pertinent part:

> "Before me, Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this, the 9th day of June, 1982, he has personally seen in plain view and within the last twenty-four hours and has probable cause to believe and does believe that there is now being cultivated marijuana plants ... upon the premises of, to-wit: Gary Dean Gillum...."

This affidavit was typed by Windsor and taken to judge Teel, who issued the search warrant. Windsor swore, under oath, to the truth and correctness of the affidavit and discussed additional facts with the Judge which were not detailed in the affidavit.

During the suppression hearing, defense counsel extensively cross-examined Windsor about his testimony before Judge Teel. The pertinent part of the record reflecting this cross-examination is as follows:

"Q. ... All right. With the information that you then had you came down, Mr. Windsor, and talked with Judge Teel?

"A. On the 9th.

"Q. On the 9th, and swore to the pertinent aspects for the purpose of getting a search warrant?

"A. Yes, sir.

"Q. And everything that you told him is within the four corners of this warrant here?

"A. No, sir, not everything.

"Q. Well, the pertinent materials are within the four corners of this warrant?

"A. There was other information mentioned.

"Q. What other information did you give him?

"A. That there was a greenhouse and there was marijuana growing in it.

"Q. Is that all?

"A. I don't remember everything that was said but there were other things.

"Q. Whatever you recall, I would

like for you to tell us what you recall.

"A. I told him to the effect that there was a large greenhouse up there on the side of the chicken house and that there was marijuana growing in it.

"Q. All right. Anything else?

"A. Not that I recall.

"Q. All right. So what you told him is those things you have just mentioned -- and of course you said in here that you had seen it?

"A. Yes, sir.

"Q. All right. And what you have told him, that was typed up and that you swore to?

"A. Yes, sir.

"Q. For the purpose of getting a search warrant?

"A. Yes, sir, that's right.

"....

"Q. You came back -- called somebody, I know that, but eventually came back to the courthouse and saw Judge Teel and told him that you had seen plants on the property of Gillum -- whatever Gillum's last name is, is

that right?

"A. Told Judge Teel that?

"Q. Yes, sir.

"A. Yes, sir.

"Q. You didn't tell him you had already been on that man's property, did you?

"A. I told him I had seen the plants.

"Q. All right. But you didn't tell him you had seen them from an opening on the property up next to the property?

"A. I don't know whether I told him that or not.

"....

"Q. Then you typed it up and went out to Judge Teel's house. What time of night, please, sir?

"A. I arrived at his house sometime shortly before twelve midnight that night. After we talked for a while, when he was ready to sign it.

"....

"Q. But, at any rate, you wanted to search a garage, two chicken houses, and any and all

outbuildings of this same residence? That's what you wanted to search, what you told the judge you wanted to search?

"A. Yes, that's what I wanted to search.

"Q. And that was what was these things right here, isn't that true? (Indicating)

"A. Yes, sir."

"Q. Is that what you wanted to search?

"A. Yes, sir.

"Q. And at the time you told the judge that, you had already been up there and seen in the slits, had you not?

"A. Yes, sir.

"Q. And you had seen those plants right there inside the fenced part but before you get to that flapping area? You had seen those plants in there, hadn't you?

"A. Yes, sir.

Our review of the affidavit and testimony leads us to conclude that the search warrant was not invalidated by

the illegally obtained information, for it is clear that the tainted information was not included in the warrant affidavit. There is no specific reference in the affidavit to the observations of marijuana growing in the greenhouse, although this information was communicated to Judge Teel outside the affidavit. The affidavit states that Windsor saw "in plain view" marijuana being cultivated on the property. Obviously Windsor's non-technical use of the term "plain view" is synonymous with the term "open view." The only plants which could be said to be in "open view" were the two initially observed by Windsor from the pond. We believe that the facts alleged in the affidavit refer to the officer's untainted observations of the marijuana

plants growing outside the greenhouse. This is supported by his testimony quoted above, where he, if effect, states that the information given the magistrate concerning the marijuana plants in the greenhouse was not included in the "four corners" of the affidavit. Even if the tainted evidence had been included in the affidavit, it would not have necessarily rendered the resulting warrant invalid. United States v. Giordano, 416 U.S. 505 (1974); United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977). In the recent case of United States v. Karo, ____ U.S. ____, 104 S. Ct. 3296, 3303 (1984), a case involving electronic surveillance, the Court determined that monitoring the beeper in a private residence not open

to visual surveillance, violated the petitioner's Fourth Amendment rights. The Court then stated:

> "... That information, which was included in the warrant affidavit, would also invalidate the warrant for the search of the house if it proved to be critical to establishing probable cause for the issuance of the warrant. However, if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nevertheless valid."

Id., ____ U.S. at ____, 104 S. Ct. at 3305. See also Neary v. State, 384 So. 2d 881 (Fla. 1980).

Thus, assuming arguendo that the affidavit's averments can be interpreted to include information gained from the tainted observations, the search warrant is not invalidated because this illegal information was not critical to establishing probable cause. The affidavit obviously includes the

untainted evidence of Windsor's initial observations of the two marijuana plants. This information was sufficient to establish probable cause. More than a mere suspicion of illegal activity resulted from an observation of two marijuana plants growing outside what appeared to be a greenhouse. The information obtained by Windsor's closer observation was merely cumulative of the information he had already obtained. As stated in United States v. Epstein, 240 F. Supp. 80, 83 (S.D.N.Y. 1965):

> "This is not to say that law enforcement officials may with impunity include impermissible matter in applications for search warrants in the hope that a Commissioner might thereby be persuaded to find probable cause where otherwise none exists or the issue is in doubt .... But in a case like the present one, where the challenged matter is merely cumulative, no such danger is run and the warrant may be upheld."

See also United States v. Sterling, 369 F.2d 799 (3d Cir. 1966) (quoting Epstein with approval).

Where a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner, and should resolve doubtful or marginal cases according to the preference to be accorded to warrants. United States v. Ventresca, 380 U.S. 102 (1965); 68 Am. Jur. 2d Searches and Seizures § 64 (1973). Great deference should be given to a magistrate's determinations. Illinois v. Gates, 462 U.S. 213 (1983); Houk v. State, 455 So. 2d 115 (Ala. Cr. App. 1984), cert. denied, 455 So. 2d 115 (Ala. 1984); Waters v. State, 357 So. 2d 368 (Ala. Cr. App.), cert. denied, 357

So. 2d 373 (Ala. 1978).

It is our judgment that the affidavit supporting the search warrant met the constitutional requisites, and the resulting search of the property was permissible. We hold that the trial court did not err when it overruled appellant Maddox's motion to suppress. The evidence seized was properly admitted into evidence at appellant Maddox's trial. It would not have been proper to suppress the evidence seized with respect to any of the appellants.

III

Having found that the search was made pursuant to a valid warrant, we find it unnecessary to address Maddox's contention that the statements he made during the search should have been suppressed as being the fruit of an

unlawful search and seizure.

IV

As we have pointed out, the sole contention of the State is that Maddox did not have standing to object to the search and seizure. In view of our findings above, we deem it unnecessary to address the questions of standing raised by the State on appeal.

We have considered appellant Maddox's contention that the trial court abused its discretion in sentencing him to fifteen years while sentencing Callahan and Gillum to three and four years, respectively. We find no merit in this contention.

For the reasons stated above, the judgment of the trial court in reference to Maddox is due to be, and it is hereby, affirmed.

We have examined the statement of additional facts set out in the supplemental brief filed on behalf of Callahan and Gillum and find no support for a different result from that which we have reached in the case of appellant Maddox. Accordingly, the judgments of the trial court in reference to appellants Callahan and Gillum are likewise due to be, and they are hereby, affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

THE STATE OF ALABAMA -- JUDICIAL

DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

Ex parte Richard M. Maddox,
Vickie Ellen Callahan, and
Gary Dean Gillum

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Richard M. Maddox,
Vickie Ellen Callahan, and
Gary Dean Gillum

84-1159 v.

State)

Decided April 25, 1986
Rehearing denied June 13, 1986

BEATTY, JUSTICE.

The Court granted certiorari in this case in order to determine whether the evidence seized pursuant to a search of a farm where Richard Maddox, Vickie Callahan,and Gary Gillum resided should

be suppressed because law enforcement officials allegedly violated their Fourth Amendment rights, and to determine whether Maddox's subsequent sentence violated his Eighth Amendment rights. We affirm in part, and remand with directions.

On December 2, 1982, Maddox was found guilty of trafficking in cannabis by a Coosa County jury and sentenced to a term of 15 years in the penitentiary. On November 18, 1983, Callahan pleaded guilty to felony possession of marijuana and was sentenced to three years' imprisonment. On the same day, Gillum pleaded guilty to trafficking in cannabis and was sentenced to four years' imprisonment. In a supplemental

plea agreement, the State, with apparent concurrence of the trial court, agreed that Callahan and Gillum retained the right to appeal the legality of the search which led to the obtaining of evidence against the petitioners. The appeals of the three petitioners were consolidated by the Court of Criminal Appeals.

On June 9, 1982, Officer David Windsor, an investigator with the Coosa County Sheriff's Department, received information that marijuana was being grown on premises subsequently determined to be occupied by Maddox, Callahan, and Gillum. Based upon this information, Officer Windsor and Coosa County Deputy Sheriff Terry Browning proceeded to the property.

Officers Windsor and Browning approached the property from a dirt road south of the property and observed what Officer Windsor described as "normal farmhouse scene." Officer Windsor testified that he observed a dwelling house, shed, garage, and chicken house, all grouped in the same general area. The chicken house was located 15 to 20 feet from the dwelling. Attached to the east side of the chicken house was a greenhouse-type structure "covered with corrugated fiberglass." The two officers observed this scene from a wooded area south of the buildings and beyond an "old fence" which encircled the property. Officer Windsor testified that the fence was approximately 200 to 300 feet south of the buildings;

however, J. M. Keel, a land surveyor, testified that the fence was 400 to 425 feet from the greenhouse.

After observing the general area, Officers Windsor and Browning then walked along the "edge of the woods" in a westerly direction to a position due south of the greenhouse. In order to get a better view, Officer Windsor then crossed the fence and concealed himself in some bushes along the edge of a pond which was on the property. With the aid of binoculars, Officer Windsor observed a "couple of small plants," which he recognized as marijuana, growing outside the greenhouse doors.

Officer Windsor then moved closer and hid behind a pickup truck parked in front of the greenhouse. He observed

two more marijuana plants growing outside the greenhouse. The greenhouse had two large doors, which were open; however, a plastic partition with large slits hung at the opening. Officer Windsor could see into the greenhouse and observed more marijuana plants. The two officers then left and obtained a search warrant based on Officer Windsor's observations.

On June 10, 1982, Officer Windsor and five other law enforcement personnel returned to the property to execute the search warrant. The warrant was directed to Gillum as owner of the property. His ownership was indicated by the county tax assessor's records. Maddox, Callahan, and Gillum were found

in the greenhouse.

During a search of the dwelling house, marijuana was found in several rooms, including the three bedrooms. The appellants accompanied the officers during the search, and Officer Windsor testified that Maddox identified one of the bedrooms as being his. The two other bedrooms were identified as belonging to Callahan and Gillum. Maddox also claimed ownership of some "cash money" which was found in the room identified as his.

The petitioners contend that Officer Windsor's intrusion into the curtilage of their residence was a violation of their Fourth Amendment rights, and, therefore, that the search

should be suppressed.

The Court of Criminal Appeals determined that Officer Windsor intruded upon the curtilage of the residence of the petitioners without a warrant in violation of the Fourth Amendment protection against unreasonable searches. However, that court held that the search warrant itself was not invalidated by the fact that the information was illegally obtained, because the tainted information was not included in the warrant affidavit.

The Fourth Amendment to the United States Constitution and Article I, § 5, of the Alabama Constitution protect people from unreasonable searches and seizures of their persons, houses,

papers, and possessions. This protection applies to the area immediately surrounding one's home, often referred to as the curtilage. Oliver v. United States, 466 U.S. 170 (1984); Whistenant v. State, 50 Ala. App. 182, 278 So. 2d 183, cert. denied, 291 Ala. 802, 278 So. 2d 198, cert. denied, 414 U.S. 1066 (1973).

Officer Windsor could legitimately search the open fields surrounding the petitioners' property without violating any Fourth Amendment rights. Moylan, The Plain View Doctrine, 26 Mercer L. Rev. 1047, 1097 (1975); Skipper v. State, 387 So. 2d 261 (Ala. Crim. App.), cert. denied, 387 So. 2d 268 (Ala. 1980). When Officer Windsor positioned

himself near the pond and spotted two marijuana plants growing outside the greenhouse, he was not violating Fourth Amendment rights, as he was not within the curtilage.

The Fourth Amendment protection applies to buildings within the curtilage. Whistenant v. State, supra. The evidence adduced at trial established that the greenhouse was within the curtilage. We agree with the Court of Criminal Appeals that when Officer Windsor entered the curtilage without a warrant he was violating the petitioners' Fourth Amendment rights. We must now determine whether this violation invalidated the search

warrant.

The warrant affidavit states in pertinent part:

> "Before me Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this the 9th day of June, 1982, he has personally see in plain view and within the last twenty-four hours and has probable cause to believe and does believe that there is now being cultivated marijuana plants ... upon the premises of, to-wit: Gary Dean Gillum...."

"The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contains allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit

suffices to show probable cause." United States v. Gardenia, 416 U.S. 505, 555 (1974) (Powell, J., concurring in part and dissenting in part). This rule has been upheld by a number of federal courts of appeals. See, e.g., United States v. Romero, 585 F.2d 391 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979); United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Watts, 176 U.S. App. D.C. 314, 540 F.2d 1093 (D.C. Cir. 1976).

Even given the illegality of Officer Windsor's intrusion into the curtilage, the warrant is valid if the underlying affidavit contains enough information independently obtained to

establish probable cause. See United States v. Adames, 485 F. Supp. 965 (E.D. N.Y. 1980), affirmed, 652 F.2d 55 (2d Cir. 1981).

Applying the above rule to the underlying affidavit in this case, we find that the affidavit contains sufficient information, independent of information related to the search within the curtilage, to enable the magistrate to find probable cause. Officer Windsor testified that he observed, from a position outside the curtilage, two marijuana plants growing outside the greenhouse. This information in itself was sufficient to establish probable cause.

Bearing in mind the limited

standard of proof necessary for a showing of probable cause, we affirm the judgment of the Court of Criminal Appeals insofar as it held that the search warrant was not invalidated by the illegally obtained information and thus that the evidence seized was properly admitted into evidence at trial.

Maddox also contends in this Court, as he did below, that the trial court abused its discretion in sentencing him to fifteen years' imprisonment, while sentencing Callahan and Gillum to three and four years' imprisonment, respectively.

The appellate courts of this state are generally prohibited from reviewing

the propriety of a sentence which is within the statutorily prescribed limits, as is Maddox's sentence. Brown v. State, 392 So. 2d 1248 (Ala. Crim. App. 1980), cert. denied, 392 So. 2d 1266 (Ala. 1981); Code of 1975, § 20-2-80. However, the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights. Ex parte Harbor, 465 So. 2d 460, 461 (Ala. 1985) (Faulkner, J., dissenting).

The United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983), recognized that reviewing courts should grant substantial deference to the

authority of legislatures in determining the kinds and limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Yet, the sentence should be proportionate to the crime. In making a proportionality determination, a court should be guided by objective criteria, including:

> "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. at 290-91.

Maddox received the maximum sentence allowed by law for his first felony conviction, while Gillum and

Callahan received a four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that court with directions to consider this case in light of Solem v. Helm, supra. It is so ordered.

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.

Torbert, C.J., Maddox, Jones, Almon, Shores, Adams, and Houston, J.J., concur.

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-426

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD M. MADDOX, VICKIE ELLEN CALLAHAN, AND GARY DEAN GILLUM,

PETITIONERS,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF
CHARLES A. GRADDICK
ATTORNEY GENERAL,

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

AND

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QUESTIONS PRESENTED

1. Where a state convict appeals his conviction, raising two unrelated federal questions and the state's highest judicial tribunal finally decides one federal question but orders further litigation on the other federal question, is the cause final for purposes of 28 U.S.C. §1257?

2. Does this Honorable Court have jurisdiction (28 U.S.C. §1257) to review a claim by a state convict, which could have been but was not presented to the highest state court in a manner which permitted that court to review the claim?

3(A). Where a law enforcement officer is in an open field and, with the aid of binoculars , observes contraband in open view inside a curtilage but outside of buildings, does such officer violate any right protected by the Fourth Amendment to the United States Constitution?

3(B). Do persons who were physically present on real property have standing to question observations of the property, where it does not appear what right, if any, such persons had to be on the property?

THE PARTIES

In the Circuit Court of Coosa County, Alabama, and the Supreme Court of Alabama the Parties were Richard M. Maddox, Vickie Ellen Callahan and Gary Dean Gillum, as Defendants and Petitioners, respectively, they being Petitioners herein, and the State of Alabama, as Plaintiff and Respondent, respectively, said State being Respondent herein. In the Court of Criminal Appeals the parties were and are the same Richard M. Maddox, Vickie Ellen Callahan and Gary Dean Gillum, as Appellants, and the same State of Alabama, as Appellee.

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NO. 86-426

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

RICHARD M. MADDOX, VICKIE ELLEN
CALLAHAN, AND GARY DEAN GILLUM,

PETITIONERS,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION
TO THE PETITION

OPINIONS BELOW

The decisions and opinions of the Alabama appellate courts will not be reported until the state appellate

litigation is complete, at which time they will be reported as follows:

Maddox, et. al. v. State, _So.2d_ (Ala.Crim.App., June 11, 1985)

A copy of the same is appended to the Petition.

Ex parte Maddox, et al.; In Re: Maddox, et al. v. State, _So.2d_ (Ala. April 25, 1986)

A copy of the same is also appended to the petition.

Maddox v. State, __So.2d__ (Ala.Crim.App., Sept. 9, 1986)[1]

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[1]An application for rehearing by Petitioner Maddox is still pending in the Court of Criminal Appeals of Alabama.

JURISDICTION

The petitioners have invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVSISIONS INVOLVED

The Petitioners are raising an alleged claim under the Fourth Amendment to the Constitution of the United States. In state court there was raised and is still being litigated a claim under the Eighth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioners Maddox and Gillum were convicted of trafficking in marijuana under Section 20-2-80(1), Code of Alabama, 1975. Petitioner Callahan was convicted of possession of marijuana under Section 20-2-70(a), Code of Alabama, 1975 (Appendix "A").

STATEMENT OF THE CASE AND THE FACTS

The main issues at this point in the litigation are:

1. Whether the judgment of the Alabama Supreme Court is final within the meaning of 28 U.S.C. §1257, and

2. Whether the Alabama Supreme Court was presented with the claim now advanced by the Petitioners at a time and in a manner which would have allowed the Alabama Supreme Court to pass on it.

Any resolution of issue 2, above, requires some knowledge of Alabama Appellate practice. A brief digest of the same is, therefore, presented under "A", below.

A.

ALABAMA APPELLATE PRACTICE

Alabama law makes appeal liberally available, and all criminal convictions can

be appealed by the convict.[2] However, there is no plain error rule, except in death cases, (Rule 45A A.R.A.P. Appendix). To obtain review of a claim, appellant must obtain an adverse ruling from the trial court. Felder v. State, 470 So.2d 1321, 1326 (Ala.Crim.App. 1984); aff'd sub nom Ex parte Felder, 470 So.2d 1330 (Ala. 1985); Leverett v. State, 462 So.2d 972, 979 (Ala.Crim.App. 1984); cert. denied. However, if an adverse ruling is obtained in the trial court, the Court of Criminal Appeals of Alabama must review it, if it is

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[2]Code of Alabama, 1975

"§12-22-130. Appealing judgment of conviction.

"A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court."

See also Rules 1 & 3, A.R.A.P., Appendix "B" to this brief.

argued on appeal and may review it, even if it is not argued. Rule 45B A.R.A.P. Appendix "B".

In comparison with the liberal allowance of appeal, discretionary review by the Alabama Supreme Court, although available in most, if not all cases, is circumscribed by several procedural technicalities.

First, Supreme Court review is limited to facts found by the Court of Appeals and set out in that Court's opinion, although a remedy is provided to parties who believe that the Court of Appeals erred in not reciting facts shown by the record or in reciting facts not supported by the record. Rule 39(k) A.R.A.P. Appendix "B". Failure to preserve essential facts prevents Supreme Court review. Ex parte Grear, 484 So.2d 481 (Ala. 1985); Ex parte Genesco, 394 So.2d 385 (Ala. 1981); Ex part Phelps, 339 So.2d 124 (Ala. 1978).

Second, before petitioning the Alabama Supreme Court, the party must apply for

rehearing in the Court of Appeals "... on the point, issue or decision. ..." on which review will be sought in the Supreme Court. Rule 39(a) A.R.A.P. Appendix "B". See Rule 40 A.R.A.P. Appendix "B", for the requirements for rehearing. Failure to raise a point on rehearing prevents Supreme Court review, even if the point was argued on appeal.

Third, after obtaining an adverse ruling on his application for rehearing, the party must petition the Alabama Supreme Court for a writ of certiorari and show how the issues on which he desires review fit into one or more of certain well defined categories. Rule 39(c) A.R.A.P. Appendix "B". The Alabama Supreme Court is not authorized to consider claims not presented in the petition (Beck v. State, 365 So.2d 1006, 1007 [Ala. 1978]; Bland v. State, 277 Ala. 4, 166 So.2d 735 [1964]) and will not

consider claims presented in the petition but not argued in brief. Jackson v. State, 265 Ala. 690, 692, 93 So.2d 808 (1957).

B.

THE PROCEDURAL HISTORY OF THIS CASE

1.

AT THE TRIAL LEVEL

The Petitioners were indicted by the Grand Jury of Coosa County, Alabama for the trafficking in (Maddox and Gillum) and possession of (Callahan) marijuana. They moved to suppress the evidence seized pursuant to a facially valid search warrant on the grounds that the affidavit on which the warrant was issued contained certain allegedly illegally obtained evidence. At a hearing on the motion it appeared that the affiant officer had made observations of the premises from several points which were beyond the curtilage and had observed plants growing outside of a green house and, with the use of binoculars from said

beyond-the-curtilage point, had identified the plants as marijuana. The officer then moved to a point within the curtilage and made further observations. All of the officer's observations were placed before the warrant magistrate in the affidavit and sworn testimony. Although the use of binoculars was shown without dispute at the hearing, no particular issue was made of it at the trial level. In addition, it did not appear what, if any, standing the Petitioners had in the premises. The motion to suppress was overruled, and Maddox went to trial. On conviction, Maddox was sentenced to fifteen (15) years[3] imprisonment, after an unfavorable pre-sentence report. Some months later, the other

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[3]There is no provision for a maximum sentence under Section 20-2-80(1), Code of Alabama, 1975; Appendix "A". Under it, Maddox could be paroled after serving three (3) years. (Ibid, Sections 15-22-26, 20-2-80[1][a] and 81[a]). Persons convicted of trafficking are eligible for "good time". (Ibid, Section 14-9-41[a][1]. See also Roberts v. State, 482 So.2d 1293 [Ala.Crim.App. 1985]) All statutes are set out in Appendix "A".

Petitioners entered plea bargains, under which Gillum was convicted of trafficking in marijuana and sentenced to four (4) years inprisonment and Callahan was convicted of possession of marijuana and sentenced to three (3) years inprisonment. (See the trial records generally and Maddox, et al. v. State, _So.2d _[Ala.Crim.App. June 11, 1985]; Mns.Op.pp.1-9)

2.

APPEAL

On appeal, the Petitioners contended that the officer's intrusion into the curtilage tainted the warrant and voided it, notwithstanding the initial beyond-the-curtilage observations. The issues presented in the Petitioners' brief in the Court of Criminal Appeals were set out as follows:

" ISSUES PRESENTED FOR REVIEW

"I. Does the Plain View Doctrine apply where, as in the case at bar, the initial intrusion is unlawful and unconstitutional?

"II. Does the Open Fields Doctrine apply to property within the curtilage of the dwelling?

"III. Should Appellant Maddox's incriminating statements be suppressed in that they were the direct result of an illegal and unconstitutional search and seizure?" (Appellants' Brief, page 1)

In a supplemental brief, the following issues were presented:

"ISSUES PRESENTED FOR REVIEW

"I. Does the Plain View Doctrine apply where, as in the case bar, the initial intrusion is unlawful and unconstitutional?

"II. Does the Open Fields Doctrine apply to property within the curtlilage of the dwelling?

"III. Did the trial court abuse its discretion in sentencing Appellant Maddox to fifteen years in the custody of the Alabama Department of Corrections, while sentencing Appellants Callahan and Gillum to

three and four years, respectively, in violation of the Constitution of the United States and the State of Alabama?" (Appellants' Supplemental Brief, page iii)

The Court of Criminal Appeals found, without reaching the standing issue, that the officer's intrusion within the curtilage violated the Petitioners' U.S. Constitutional rights.[4] However, the Court concluded that there was sufficient legally obtained evidence before the magistrate to authorize the warrant, and upheld the search warrant.[5] The Court also rejected Petitioner Maddox's contention that his sentence was disproportionate. The Court affirmed all three convictions and sentences. Maddox, et al. v. State, _So.2d_ (Ala.Crim.App. June 11, 1985).

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[4]The State of Alabama has never conceded and still objects to this conclusion.

[5]See United States v. Karo, 468 U.S. , 82 L.Ed.2d 530, 544-545, 104 S.Ct. 3296, 3303 (1984), cited by the Court of Appeals at page 13 of the manuscript opinion. See also Franks v. Delaware, 438 U.S. 154, 171-172, 57 L.Ed.2d 667, 682, 98 S.Ct. 2674 (1978).

The Petitioners applied for rehearing and argued the following points:

> "I. THE ILLEGAL AND UNCONSTITUTIONAL INTRUSION BY OFFICER WINDSOR INTO THE CURTILAGE OF THE RESIDENCE WHERE APPELLANTS RESIDED REQUIRES THE SUPPRESSION OF ALL EVIDENCE DISCOVERED." (Rehearing Brief, page 7)

> "II. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT MADDOX TO 15 YEARS IN THE CUSTODY OF THE ALABAMA DEPARTMENT OF CORRECTIONS, WHILE SENTENCING APPELLANTS CALLAHAN AND GILLUM TO THREE AND FOUR YEARS, RESPECTIVELY, IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF ALABAMA." (Rehearing Brief, page 20)

No issue was made of the officer's use of binoculars for his beyond-the-curtilage identification of the marijuana plants, either on original submission or rehearing.

3.

CERTIORARI IN THE ALABAMA SUPREME COURT

The issues presented to the Alabama Supreme Court in the Petitioners' certiorari petition and argued in their brief were the

same as those raised on rehearing in the Court of Criminal Appeals. As stated in the Petitioners' brief they were:

"ISSUES PRESENTED FOR REVIEW

> "I. Does the illegal and unconstitutional intrusion by Officer Windsor into the curtilage of the residence where Petitioners resided require the suppression of all evidence discovered within the curtilage?
>
> "II. Did the trial court abuse its discretion in sentencing Petitioner Maddox to 15 years in the custody of the Alabama Department of Corrections, while sentencing Petitioners Callahan and Gillum to three and four years, respectively, in violation of the constitutions of the United States and the State of Alabama?" (Petitioners' Brief, page V)

The Alabama Supreme Court issued the writ and affirmed the holding and reasoning of the Court of Criminal Appeals on the search and seizure issue. In addition, the Alabama Supreme Court ruled:

"Maddox also contends in this Court, as he did below, that the trial court abused its discretion in sentencing him to fifteen years' imprisonment, while sentencing Callahan and Gillum to three and four years' imprisonment, respectively.

"The appellate courts of this state are generally prohibited from reviewing the propriety of a sentence which is within the statutorily prescribed limits, as is Maddox's sentence. Brown v. State, 392 So.2d 1248 (Ala.Crim.App. 1980), cert. denied, 392 So.2d 1266 (Ala. 1981); Code of Alabama, 1975, §20-2-80. However, the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights. Ex parte Harbor, 465 So. 2d 460, 461 (Ala. 1985) (Faulkner, J., dissenting).

"United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983), recognized that reviewing courts should grant substantial deference to the authority of legislatures in determing the kinds of limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Yet, the sentence should be proportionate to the crime. In making proportionality determination, a court should be guided by objective criteria, including:

> '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentenced imposed for commission of the same crime in other jurisdictions.' Solem v. Helm, 463 U.S. at 290-291.
>
> "Maddox received the maximum sentence allowed by law for his first felony conviction, while Gillum and Callahan received four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that court with directions to consider this case in light of Solem v. Helm, supra. It is so ordered.
>
> 'AFFIRMED IN PART AND REMANDED WITH DIRECTIONS." (Ex parte Maddox, So.2d. [Ala. April 25, 1986], Mns.-Op.pp. 6-7)

The Petitioners applied for rehearing in the

Alabama Supreme Court, as did the State.[6] In their brief in support of their application for rehearing, the Petitioners for the first time in any Alabama court argued that the officer's use of binoculars from beyond the curtilage constituted a violation of their constitutional rights. However, even at this point, the Petitioners did not present this as a separate issue. Both applications were overruled.

On remandment, the Court of Criminal Appeals ruled, on September 9, 1986, that Maddox's sentence

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[6]The State's application was limited to the ruling on the proportionality of Maddox's sentence. The State pointed out that the Alabama Supreme Court's ruling was in patent conflict with this Honorable Court's decisions and opinions in Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984); Solem v. Helm, 463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983) and Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980). Conflicts with United States Court of Appeals decisions were also called to the Alabama Supreme Court's attention. E.g., Smith v. Wainwright, 741 F.ed 1248, 1259 [11th Cir. 1984] cert. denied, _U.S._, 85 L.Ed.2d 151, 105 S.Ct. 1883 and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985).

was not disproportionate under the Eighth Amendment to the U.S. Constitution. Maddox v. State, __So.2d.__(Ala.Crim.App. Sept. 9, 1986) On September 23, 1986, the Petitioner applied for rehearing in the Court of Criminal Appeals of Alabama. Said application is still outstanding.

SUMMARY OF THE ARGUMENT

1. Since there is an outstanding federal question still in active litigation in the state courts, this case is not final for purposes of 28 U.S.C. §1257.

2. Since the Petitioners did not raise the issue they seek to raise here on rehearing in the Court of Criminal Appeals of Alabama nor in their certiorari petition nor in their supportive brief in the Alabama Supreme Court, said issue was never before the Alabama Supreme Court. Rule 39(a) & (c) A.R.A.P. Appendix "B". Therefore, said issue is not properly before this Honorable Court. 28 U.S.C. §1257; Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

3. The use of binoculars to enhance an observation of objects that are not inside a home or other building from a point beyond the curtilage, does not violate the Fourth Amendment. United States v. Allen, 675 F.2d 1373 (9th Cir. 1980), United States v. Lace, 669 F.2d 46 (2nd Cir. 1981); United States v. Whaley, 779 F.2d 585 (11th Cir. 1985). See also Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 40 L.Ed.2d 607, 94 S.Ct. 2114 (1974); California v. Ciraolo, 476 U.S._, 90 L.Ed.2d 210, 106 S.Ct._(1986); Dow Chemical Company v. United States, 476 U.S._, 90 L.Ed.2d 226, 106 S.Ct. _(1986). In addition, the Petitioners never made any effort to show what standing they had in the observed premises. Therefore, the Petitioners have no standing to raise the claim they now raise. Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978); United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100

S.Ct. 2547 (1980); Rawlings v. Kentucky, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980).

ARGUMENT

I.

THIS CASE IS NOT FINAL WITHIN THE MEANING OF 28 U.S.C.§1257

Recognizing that this case is not final, the Petitioners urge this Honorable Court to follow the reasoning of Cox Broadcasting Corp. v. Cohn (420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 [1975]). However, In Cox this Court observed:

> "...[The] circumstances... [permitting a departure from the finality requirement are] said to be very few,...; but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257

> and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date... and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice,. ..." (420 U.S. 469, 477-478, 43 L.Ed.2d 328, 339; emphasis supplied.)

The difference between the instant case and Cox and the other cases wherein this Honorable Court has dispensed with the finality requirement is that in this case the still pending issue is a federal constitutional question.[7] Should the Alabama Courts finally reject Maddox's Eighth Amendment proportionality claim, Maddox will certainly be seeking review in this Court, as will the State of Alabama in

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[7]The Petitioners characterize the issue as a state law issue, but the Alabama Supreme Court clearly based its decision on the Eighth Amendment to the Constitution of the United States.

the event of an opposite holding. Why not decide all of the federal questions in one proceeding, rather than one now and another later? On the other hand, the Petitioners have suggested no harm that will be visited on them, if piecemeal review is not allowed.

This case is not final, and the Petitioners have shown no reason for proceeding now. For these reasons, the writ should be denied.

II.

THE ALABAMA SUPREME COURT NEVER HAD AN OPPORTUNITY TO RULE ON THE ISSUE PRESENTED BY THE PETITION.

Prior to their application for rehearing in the Alabama Supreme Court the Petitioners' search and seizure argument had two parts:

1. In entering the curtilage after his initial observation of marijuana from an open field, the officer violated the petitioners' Fourth Amendment rights, and

2. Therefore, the search warrant was void.

The State's response was as follows: (1) The officer's action in entering the curtilage was reasonable in that his observations from the open field had given him probable cause and his intrusion into the curtilage was minor, brief and justified by the need to determine the exact nature and size of the operation. (2) The Petitioners have never made any effort to show their standing to object to the intrusion; indeed, Petitioner Maddox specifically denied any interest in the property. And, (3) prior to his intrusion, the officer had lawfully obtained sufficient evidence to constitute probable cause and had presented this lawfully obtained evidence to the magistrate. The Court of Criminal Appeals agreed that the officer had violated the Fourth Amendment in entering the curtilage, declined to address the State's standing argument and upheld the search warrant

under United States v. Karo, (468 U.S._, 82 L.Ed.2d 530, 544-545, 104 S.Ct. 3296 [1984]). The same arguments were advanced on rehearing in the Court of Appeals and on certiorari in the Alabama Supreme Court, and the results were the same. Until rehearing in the Alabama Supreme Court, no issue was made of the officer's use of binoculars for his beyond-the-curtilage identification of the marijuana. This issue, the only one presented by the instant petition in this Court, was first mentioned in the argument on the Petitioners' application for rehearing in the Alabama Supreme Court. The Alabama Supreme Court denied rehearing without opinion.

Under the plain words of 28 U.S.C. §1257(3), the state supreme court must have had the opportunity to address the federal question on which review is sought here. Where, as here, a state supreme court does not address

such an issue, it is presumed that the issue was not properly before that Court. Exxon Corp. v. Eagerton, note 3, 462 U.S. 176, 181, 76 L.Ed.2d 497, 504, 103 S.Ct. 2296 (1983); Hanson v. Denckla, 357 U.S. 235, 244, 2 L.Ed.2d 1283, 1292, 78 S.Ct. 1228 (1958). Slagle v. Ohio, 366 U.S. 259, 264, 6 L.Ed.2d 277, 281, 81 S.Ct. 1076 (1961). However, no such presumption is necessary here, since the Petitioners' failure to comply with the Alabama Rules of Appellate procedure with regard to the binoculars issue clearly barred the Alabama Supreme Court from considering that issue. Any one of the following deprives the Alabama Supreme Court of authority to review an issue on certiorari: (1) Failure to raise the point on rehearing in the Court of Criminal Appeals (R. 39([a] A.R.A.P. Appendix "B"), (2) Failure to present the point in the certiorari petition (Beck v. State, 365 So.2d 1006, 1007 [Ala. 1978]; Bland v. State, 277 Ala. 4, 166 So.2d

735 [1964]) or, (3) Failure to argue the point in brief. Jackson v. State, 265 Ala. 690, 692, 93 So.2d 808 (1957). The Petitioners failed in each of these regards as to the binoculars issue. Even if the Alabama Supreme Court noticed this claim, buried as it was in the rehearing argument and desired to address it, the Court would have had no jurisdiction to do so. Therefore, this claim is as a practical matter presented for the first time in this Court, and, for that reason, review should be denied. Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

III.

THE USE OF BINOCULARS DID NOT VIOLATE THE PETITIONERS' RIGHTS.

While acknowledging, at least in this Court, that the officer's observations from an

open field were proper,[8] the Petitioners argue that the officer's use of binoculars violated the Fourth Amendment. The numerous cases cited by the Petitioners in support of this position need not be distinguished by the Respondent State, because they all support the legality of the enhanced observations sub judice.

The only case cited by the Petitioners which found any enhanced observation objectionable was United Stats v. Toborda (635 F.2d 131 [2nd Cir. 1980]). But, the objected to enhanced observations in Toborda were of activities inside a home. The courts have always recognized greater privacy rights in the home than elsewhere. Compare Camara v. Municipal Court, 387 U.S. 523, 18 L.Ed.2d 930, 87 S. Ct. 1727 (1967) with Donovan v. Dewey, 452 U.S. 594, 69 L.Ed.2d 262, 101 S.Ct. 2534 (1981);

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[8]Oliver v. United States, _U.S._, 80 L.Ed.2d 214, 104 S.Ct. (1984); Hester v. United States, 265 U.S. 57, 68 L.Ed.2d 898, 44 S.Ct. 445 (1929).

Michigan v. Tylar, 436 U.S. 499, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1977) with Michigan v. Clifford, 464 U.S. 287, 78 L.Ed.2d 477, 104 S.Ct. 641 (1984), and Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) with United States v. 37 Photographs, 402 U.S. 363, 376, 28 L.Ed.2d 822, 834, 91 S.Ct. 1440 (1971). See also United States v. Karo, 468 U.S._, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984) The United States Court of Appeals for the Second Circuit in Toborda simply applied this classic policy to enhanced views. The marijuana plants observed through the binoculars in the instant case were not inside a home or any other building and, therefore, Toborda does not apply here.

The other cases cited and relied on by the Petitioners all approved of the use of binoculars for observing outside conditions and activities within a curtilage from a point beyond. United States v. Allen, 675 F.2d 1373

(9th Cir. 1980)[9]; United States v. Lace, 669 F.2d 46 (2nd Cir. 1981)[10]; United States v. Whaley, 779 F.2d 585 (11th Cir. 1985).[11] The marijuana plants observed in the instant case were growing in the ground, inside the curtilage but outside of any building. Compare State v. Hobron (65 Haw. 157, 648 F.2d 194 [1982]), wherein the Supreme Court of Hawaii refused to extend its earlier decisions on telescopic observation of the interior of buildings to enhanced observations of exterior conditions. The decisions of this Honorable Court on enhanced observation and photography of exteriors have also consistently refused to

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[9]United States v. Toborda (491 F.Supp. 50 [E.D.N.Y., 1980]) distinguished at 675 F.2d 1373, 1380.

[10]United States v. Toborda (635 F.2d 131 [2nd Cir. 1980]) distinguished at 669 F.2d 46, 51.

[11]Toborda distinguished at 779 F.2d 585, 591, with regard to binocular enhanced observation of the interior of a building.

find fault under the Fourth Amendment. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 40 L.Ed.2d 607, 94 S.Ct. 2114 (1974); California v. Ciraolo, 476 U.S._, 90 L.Ed.2d 210, 106 S.Ct._ (1986); Dow Chemical Company v. United States, 476 U.S._, 90 L.Ed.2d 226, 106 S.Ct._ (1986).

Finally, these Petitioners have made no effort to show their standing to object to any search of these premises. Petitioner Gillum was listed in the tax records as the owner of this property, but, for all that appears he may have leased the property to another and have had no more right to be on the premises than the officers. The record is silent as to Petitioner Callahan's connection with the property, and Petitioner Maddox affirmatively denied any connection with the property at all. For all that appears of record in this case, these Petitioners were trespassers on the property. This record will not support a finding that

these Petitioners had any standing at all to question any observation or search of this property. Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978); United States v. Salvucci, 448 U.S. 83, 65 L.Ed.2d 619, 100 S.ct. 2547 (1980); Rawlings v. Kentucky, 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556 (1980).

CONCLUSION

In conclusion, the Respondent submits as follows:

1. This case is not final for purposes of 28 U.S.C. §1257.

2. The Alabama Supreme Court never had the opportunity to address the issue the Petitioners raise here.

3. The enhanced observations were manifestly legal, and

4. The Petitioners have no standing to raise the issue here presented.

Therefore, the Respondent State prays that the writ be denied.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

OFFICE OF THE ATTORNEY GENERAL
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11 SOUTH UNION STREET
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(205) 261-7300

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____day of October, 1986, I did serve the requisite number of copies of the foregoing on the Attorney for Richard M. Maddox, Vickie Ellen Callahan, and Gary Dean Gillum, Petitioners, by mailing the same to said attorney, first-calss postage prepaid and addressed as follows:

Honorable David Cromwell Johnson
Attorney at Law
300 21st Street, North
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
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October 20, 1986

Honorable William H. Rehnquist
Chief Justice and the
Honorable Associate Justices of the
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Your Honors:

RE: Maddox, et al v. Alabama
No. 86-426

The purpose of this letter is to acquaint the Court with an additional development, which arose after the printing of our opposition brief in the above-styled cause.

Our brief is accurate up to October 16, 1986. However, on that date the Court of Criminal Appeals of Alabama denied rehearing to Petitioner Maddox on the Eighth Amendment issue. See page 2 of our brief and the paragraph which begins on page 17 and continues on page 18 of the same. Since the printing of our brief was also completed on that same date, October 16, 1986, we were not able to refer to this ruling in our brief.

Maddox now has two weeks from October 16, 1986, to seek review of this Eighth Amendment claim in the Alabama Supreme Court. If he declines to seek such review or if it is

denied, this case would become final, and the first issue and argument in our brief would be mooted. Of course, this would have no affect on our other issues and arguments.

Respectfully submitted,

Charles A. Graddick
CHARLES A. GRADDICK
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James B. Prude
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ASSISTANT ATTORNEY GENERAL

Joseph G. L. Marston III
JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

cc: Honorable David Cromwell Johnson
Attorney at Law

Supreme Court of Alabama

Court of Criminal Appeals of Alabama

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 86-426

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

RICHARD M. MADDOX,
VICKIE ELLEN CALLAHAN,
AND GARY DEAN GILLUM,

PETITIONERS

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDICIES TO THE BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

JAMES B. PRUDE
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ATTORNEYS FOR RESPONDENT

HDPP

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ATTORNEYS FOR RESPONDENT

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APPENDIX A

RELEVANT ALABAMA STATUTES

CODE OF ALABAMA, 1975

TITLE 12

§12-22-130. Appealing judgment of conviction.

A person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the supreme court or court of criminal appeals may appeal from the judgment of conviction to the appropriate appellate court.

TITLE 14

§14-9-41. Computation of incentive time deductions.

(a) Each prisoner who shall hereafter be convicted of any offense against the laws of the state of Alabama and is confined, in execution of the judgment or sentence upon any conviction, in the penitentiary or at hard labor for the county or in any municipal jail for a definite or indeterminate term, other than for life, whose

record of conduct shows that he has faithfully observed the rules for a period of time to be specified by this article may be entitled to earn a deduction from the term of his sentence as follows:

(1) Seventy-five days for each 30 days actually served while the prisoner is classified as a Class I prisoner.

(2) Forty days for each 30 days actually served while the prisoner is a Class II prisoner.

(3) Twenty days for each 30 days actually served while the prisoner is a Class III prisoner.

(4) No good time shall accrue during the period the prisoner is classified as a Class IV prisoner.

(b) Within 90 days after May 19, 1980, the commissioner of the department of corrections shall establish and publish in appropriate directives certain criteria not in conflict with this article for Class I, II, III, and IV prisoner classifications. Such classifications shall encompass consideration of the prisoner's behavior,

discipline, work practices and job responsibilities.

(c)(1) Class I is set aside for those prisoners who are considered to be trustworthy in every respect and who, by virtue of their work habits, conduct and attitude of cooperation have proven their trustworthiness. An example of a Class I inmate would be one who could work without constant supervision by a security officer.

(2) Class II is that category of prisoners whose jobs will be under the supervision of a correctional employee at all times. Any inmate shall remain in this classification for a minimum period of six months before being eligible for Class I.

(3) Class III is for prisoners with special assignments. They may not receive any of the privileges of Class I and II inmates. Any inmate shall remain in this classification for a minimum period of three months before being eligible for Class II.

(4) Class IV is for prisoners not yet classified

and for those who are able to work and refuse, or who commit disciplinary infractions of such a nature which do not warrant a higher classification, or inmates who do not abide by the rules of the institution. Inmates who are classified in this earning class receive no correctional incentive time. This class is generally referred to as "flat time" or "day-for-day." Any inmate shall remain in this classification for a minimum period of 30 days before being eligible for Class III.

(5) No inmate may reach any class without first having gone through and meeting the requirements of all lower classifications.

(d) As a prisoner gains a higher classification status he shall not be granted retroactive incentive credit based on the higher classification he has reached, but shall be granted incentive credit based solely on the classification in which he was serving at the time the incentive credit was earned. Nothing in this article shall be interpreted as authorizing an inmate incentive credits based on the highest

classification he attains for any period of time in which he was serving in a lower classification or from the date of his sentence.

(e) Provided, however, no person may receive the benefits of correctional incentive time if he or she has been convicted of a Class A felony or has been sentenced to life, or death, or who has received a sentence for 10 years or more in the state penitentiary or in the county jail at hard labor or in any municipal jail. No person may be placed in Class I if he or she has been convicted of an assault where the victims of such assault suffered the permanent loss or use or permanent partial loss or use of any bodily organ or appendage. No person may be placed in Class I if he or she has been convicted of a crime involving the perpetration of sexual abuse upon the person of a child under the age of 17 years.

The court sentencing a person to prison shall note upon the transcript to accompany such prisoner the fact that he or she has been sentenced as a result of a crime that forbids his or her being classified as a Class I prisoner.

(f)(1) If during the term of imprisonment a prisoner commits an offense or violates a rule of the department of corrections, all or any part of his correctional incentive time accrued pursuant to this section shall be forfeited.

(2) The commissioner of the department of corrections shall have the power to restore any prisoner who has heretofore, or who may hereafter, forfeit the deductions allowed him or her for good behavior, work habits and cooperation, or good conduct, by violating any existing law or prison rule or regulation such portion of his deduction for good conduct or good behavior as may be proper in his judgment, upon recommendation and evidence submitted to him by the warden in charge.

(g)(1) When a prisoner is serving two or more terms of imprisonment and the sentences run consecutively, then all such sentences shall be combined for the purpose of computing deductions for correctional incentive time and release date; however, the actual deduction from sentence for correctional incentive time

provided by this section shall apply only to sentences to be served.

(2) When a prisoner is serving two or more sentences which run concurrently, the sentence which results in the longer period of incarceration yet remaining shall be considered the term to which such prisoner is sentenced for the purpose of computing his release date and correctional incentive time under the provisions of this article. When computing the deductions allowed in this section on indeterminate sentences the maximum sentence shall be the basis for the computation. The provisions of this section shall be administered by the chief administrative officer of the penal institution as it applies to prisoners in any state penal institution, by the sheriff of the county as it applies to prisoners in any county jail and by the chief of police as it applies to prisoners in any municipal jail.

TITLE 15

§15-22-26. Standards for release of prisoners on parole.

No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of pardons and paroles is of the opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society. If the board shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and enclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled until the expiration of the maximum term specified in his sentence or until he is fully pardoned.

TITLE 20

§20-2-70. Prohibited acts A.

(a) Except as authorized by this chapter, any person who

possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition, may be fined not more than $25,000.00; provided, that any person who possesses any marihuana for his personal use only is guilty of a misdemeanor and, upon conviction for the offense, shall be imprisoned in the county jail for not more than one year, and in addition, shall be fined not more than $1,000.00; provided further, that the penalties for the subsequent offenses relating to possession of marihuana shall be the same as specified in the first sentence of this subsection.

(b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and, upon conviction for the first offense may be imprisoned for not

less than two nor more than 15 years and may be fined not more than $25,000.00.

ARTICLE 4A.

TRAFFICKING IN ILLEGAL DRUGS

§20-2-80. Trafficking in cannabis, cocaine, etc.; mandatory minimum terms of imprisonment.

Except as authorized in chapter 2, Title 20:

(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

a. Is in excess of one kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $25,000.00.

b. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years and to pay a fine of $50,000.00.

c. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.00.

(2) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, described in section 20-2-25(1), is guilty of a felony, which felony shall be known as "trafficking in cocaine." If the quantity involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum terms of imprisonment of three calendar years and to pay a fine of $50,000.00.

b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years and to pay a fine of $100,000.00.

c. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.00.

(3) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, four grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described is section 20-2-23(2) or section 20-2-25(1)a, or four grams or more of any mixture containing any such substance, is guilty of a felony, which felony shall be known as trafficking in illegal drugs." If the quantity involved:

a. Is four grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $50,000.00.

b. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.00.

c. Is 28 grams or more, such person shall be sentenced to a mandatory term of imprisonment of 25 calendar years and to pay a fine of $500,000.00.

§20-2-81. Sentence not to be suspended, deferred, etc., prior to mandatory minimum term; reduction, suspension, etc., of sentence for assistance in identification, arrest, etc., of accessories, principals, etc.

(a) Notwithstanding the provisions of chapter 22, Title 15, with respect to any person who is found to have violated this article, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the man-

datory minimum term of imprisonment prescribed by this article.

(b) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this article and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

APPENDIX B

RELEVANT ALABAMA COURT RULES

ALABAMA RULES OF APPELATE PROCEDURE

RULE 1. SCOPE OF RULES

These rules govern appeals to the Supreme Court, the Court of Civil Appeals, and the Court of Criminal Appeals, and proceedings on petitions for writs or other relief which these courts or judges thereof are empowered to grant. All cases appealable to the Court of Criminal Appeals shall be governed by those rules contained herein which are applicable to appeals to that court; and, pre-trial appeals by the state in criminal cases shall be governed also by the rules of criminal procedure providing for such appeals. These rules shall not be construed to extend or limit the

jurisdiction of these appellate courts as established by constitution or law. They shall be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits.

RULE 3. APPEAL AS OF RIGHT-HOW TAKEN

(a) Filing the Notice of Appeal.

(1) In civil cases an appeal permitted by law as of right, or a review by certiorari in a workmen's compensation case, shall be taken to an appellate court by filing a notice of appeal with the clerk of the trial court, within the time allowed in Rule 4. The appellant shall cause a sufficient number of additional copies of the notice of appeal to be marked filed with the date of filing noted thereon and certified as a true copy by the clerk of the trial court

for service on the persons and parties as provided by (d)(1) of this rule. Appeals by permission from interlocutory orders shall be taken in the manner prescribed by Rule 5.

(2) In criminal cases, an appeal permitted by law as a matter of right to an appellate court shall be taken by filing a written notice of appeal with the clerk of the trial court within the time allowed by Rule 4, or by the defendant's giving an oral notice of appeal at the time of sentencing, which oral notice shall be noted of record; provided, that a pre-trial appeal by the state shall be taken by filing a written notice of appeal in the manner, and within the time, specified by the rules of criminal procedure providing for such appeals. The clerk of the trial court shall serve copies of the notice of

appeal on the persons specified by (d)(2) of this rule.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion, or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Form and Content of Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and

shall name the court to which the appeal is taken. Such designation of judgment or order shall not, however, limit the scope of appellate review.

If the notice of appeal names the wrong appellate court to which the appeal is taken, such designation shall be treated as a clerical mistake and corrected accordingly. The necessary clerical steps shall be taken to docket the appeal and to file the record and briefs in the appropriate appellate court.

(d) Service of the Notice of Appeal.

(1) In civil cases, the clerk of the trial court shall serve a true copy of the filing notice of appeal, or any amendment thereto, as required in (a)(1) above, personally or by mailing a copy thereof to each of the following: the clerk of the appropriate appellate court;

the court reporter who reported the evidence; counsel of record for each adverse party, or, if an adverse party is not represented by counsel, to such party at his last known address. Service shall be sufficient notwithstanding the death of the party or his counsel. In civil cases the copy of the notice of appeal to the clerk of the appellate court will be accompanied by payment of the docket fee as provided in Rule 35A(1).

(2) In criminal cases, the clerk of the trial court shall serve notice of appeal, whether oral or written, upon each of the following: the clerk of the appropriate appellate court; the reporter who reported the evidence; the defendant; defendant's appellate counsel; the district attorney of the circuit in which the trial court is situated; and the Attorney General.

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEALS

(a) Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue, or decision complained of, except that, in the case of a pre-trial appeal by the state in a criminal case, either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of

certiorari, with an accompanying brief, shall be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (2 weeks) after the decision of the court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within 7 days (1 week) of the judgment of the court of criminal appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless

counsel who represented the appellant on the original appeal has been replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writ of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

(2) From decisions that affect a class

of constitutional, state or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the Supreme Court or the courts of appeal; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court of appeals, and that part of the prior decision of the Supreme Court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling Supreme Court cases overruled

which were followed in the decision of the court of appeals.

(d) Form of Petition. The petition shall be on legal-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based; and,

(4) A copy of the opinion of the court of appeals shall be attached to the

petition as an exhibit.

(e) Service. Nine copies of the petition and briefs shall be filed with the clerk of the Supreme Court, one copy with the clerk of the appropriate court of appeals, and one copy shall be served on each party to the proceeding in the court of appeals including those not joining in the petition.

(f) Briefs. Petitioner's brief shall be on the same size paper and bound as briefs for appeals and shall accompany the petition for writ of certiorari. No more briefs will be required of petitioner, although he may file an answering brief within 14 days (2 weeks) --or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receipt of respondent's brief. Within 14 days (2

weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after service of the petition and brief by petitioner, the respondent may file an initial brief limited solely to the issue of whether or not any of the grounds set forth in (c)(1)-(5) authorize the granting of a writ. Thereafter, if the writ should be granted, the respondent may file a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of certiorari, within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after notice that the writ has been granted. Nine copies of the reply brief shall be filed with the clerk of the supreme court and one copy shall be served on the petitioner or his attorney.

No more shall be required of respondent.

The word "brief" as used in this rule includes an appendix where brief and appendix were employed by the party in the court of appeals.

(g) Action on Petition. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the clerk of the appropriate court of appeals. The record, one copy of the briefs, and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Oral Argument. There will be no oral argument on preliminary examination.

In the event the writ is granted, oral argument may be requested in writing by either party within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receiving notice of the granting of the writ. A copy of the request shall be served on the adverse party.

(i) Submission. If either party shall have made known a desire for oral argument, the clerk of the supreme court shall endorse that fact on the proper docket and, if oral argument is not determined under the criteria of Rule 34 to be unnecessary, shall set the case down for oral argument not less than 14 days (two weeks) after notifying the parties, or their attorneys or record, in writing of such setting. If neither

party shall have requested oral argument, as herein provided, or if the supreme court shall have determined oral argument to be unnecessary, the clerk of the supreme court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case upon the record, briefs, and appendices, if any.

(j) Rehearing. No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied.

(k) Scope of Review. The review shall be that generally employed by certiorari and will oridinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on

application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error of defect in

the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of petitioner.

RULE 40. APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1

week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.

RULE 45A. SCOPE OF REVIEW IN DEATH CASES

In all cases in which the death penalty has been imposed, the Court of

Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.

RULE 45B. SCOPE OF REVIEW IN CASES OTHER THAN DEATH CASES

In those criminal cases in which the death penalty has not been imposed, the Court of Criminal Appeals shall not be obligated to consider questions or issues not presented in briefs on appeal.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of September, 1986, I did serve the requisite number of copies of the foregoing on the Attorney for Richard M. Maddox, Vickie Ellen Callahan, and Gary Dean Gillum, Petitioners, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable David Cromwell Johnson
Attorney at Law
300 21st Street, North
Birmingham, Alabama 35203

_____
JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
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